

EXHIBIT 1

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:
SEPTEMBER 11 LITIGATION

21 MC 101 (AKH)

March 18, 2008
1:00 p.m.

Before:

HON. ALVIN K. HELLERSTEIN

District Judge

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22 witnesses whose depositions we have requested in a Touhy
23 request.

24 THE COURT: That would force me to rule on the issue
25 that you raised in your reply papers, namely whether allegedly
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1 negligent inattention by the government in preparation for 9/11
2 to avoid 9/11 is an intervening cause or could be an
3 intervening cause in relation to the potential liability of the
4 aviation defendants. That would be the ground of relevance,
5 wouldn't it?

6 MR. BARRY: Well, it's not exactly --

7 THE COURT: Mr. Podesta is anxious --

8 You have a tough time, Mr. Barry.

9 MR. BARRY: Yes, well, they have their problems at
10 that table, and I've got mine.

11 MR. PODESTA: Your Honor, Roger Podesta. He has
12 always used a quick hook on us when we argued.

13 MR. BARRY: It's not quite so simple as intervening
14 cause, your Honor, and I think the issue really comes down
15 to -- and it's a legal one, but it's combined with evidence
16 that we're going to have to develop -- and that is who was in
17 the best position to prevent the attack on the United States of
18 September 11, 2001.

19 THE COURT: Let's say arguably the government was.

20 MR. BARRY: We're heading in the right direction.

21 THE COURT: But if your clients, your liaison clients,
22 all of them or some of them, were also negligent, were would
23 the government's negligence be a defense?

24 MR. BARRY: I think there are two different areas of
25 negligence that you have to look at. One is whether a screener
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1 in passing through the terrorists may have missed something and
2 whether that screener and that airline owed a duty -- and I
3 would like to concentrate just on the property plaintiffs
4 here -- owed a duty to the property plaintiffs to protect them
5 from a criminal terrorist act.

6 THE COURT: That's a legal issue raised by the motion
7 to dismiss the cases on the ground there is no duty.

8 MR. BARRY: Or a motion for summary judgment which
9 included evidence that we obtained from the government that
10 they were unable to prevent this attack.

11 THE COURT: That wouldn't say anything about duty, I
12 don't think, Mr. Barry.

13 MR. BARRY: Well, I think it does, your Honor.

14 THE COURT: Well, anyway, this is not the right forum
15 for me to make rulings on these issues, because I need to be
16 informed by your briefs. And what you have told me is that now
17 that there are two aspects to what you are thinking about
18 making motions. One is in the Freedom of Information Act case
19 that you have brought.

20 MR. BARRY: Administrative Procedures Act.

21 THE COURT: Yes, where the government has raised the
22 issue of what you call the Touhy case, the case of United
23 States v. Ragen, 340 U.S. 462, decided 1951, and later glosses
24 on the case by the Second Circuit. That's one stated motion.

25 MR. BARRY: That's one motion, a motion for summary
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13 clarification, truly one. I think we misheard Mr. Barry when
14 he was speaking to our damage issues, and your Honor asked him
15 about the propriety of a dispositive motion relating to --

16 THE COURT: He is not on that. We will come back to
17 it. I'm more at this point interested in -- because I think it
18 affects more people -- I'm interested in the combination of the
19 Touhy and the 9/11 motions.

20 MR. BARRY: And I think it certainly has the potential
21 of affecting how much discovery is going to have to be done or
22 not done.

23 THE COURT: Right.

24 MR. BARRY: One follow-on to the APA motion would be
25 if that motion were to be denied, and deposition testimony of

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1 those witnesses from the F.B.I. that we want were not
2 permitted, we intend to bring a motion under Federal Rule of
3 Evidence 807 to have their prior testimony and statements once
4 again not excluded on the basis of hearsay.

5 THE COURT: Who are these people?

6 MR. BARRY: They are the same F.B.I. witnesses that we
7 want to depose. We have also got a similar motion in respect
8 of Khalid Sheikh Mohammed and bin al-Shibh, two of the
9 masterminds who are detainees down at Guantanamo, and whose
10 statements were used in the Moussaoui trial.

11 THE COURT: Ms. Goldman, that also affects the Touhy
12 approach, doesn't it?

13 MS. GOLDMAN: I'm sorry?

14 THE COURT: That also affects the APA case.

15 MS. GOLDMAN: Well, from what I understand --

16 THE COURT: A lot of differences as well.

17 MS. GOLDMAN: Are you talking about -- I mean there
18 has been no action with respect to Khalid Sheikh Mohammed. You
19 are not talking about that. Those witnesses are unavailable,
20 and they won't be made available.

21 MR. BARRY: Yes, but they provided testimony in
22 statements that were used in the Moussaoui trial. Correct?

23 MS. GOLDMAN: Correct.

24 MR. BARRY: And under Rule 807 we would like to get an
25 order that that is not hearsay so that that testimony and

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1 statements could be used in our trial.

2 MS. GOLDMAN: Right, and that's --

3 THE COURT: What's the volume of those statements?

4 MR. BARRY: I don't think -- it's not enormous, your
5 Honor.

6 THE COURT: And does everybody have access to those
7 statements?

8 MR. BARRY: Yeah.

9 MS. GOLDMAN: Yes. That's not an issue for us.
10 That's an issue between the defendants and the plaintiffs. But
11 again if that was something you could do first, agree to use
12 that, then we wouldn't have to go through these depositions.

13 MR. BARRY: We want the deposition testimony of the
14 witnesses, your Honor. That's what we want first. If we don't
15 get the deposition testimony of the witnesses, our fall-back is
16 to get their statements admitted.

17 THE COURT: It seems to me there can't be any real

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18 issue concerning the inaccessibility of these witnesses.
19 MR. BARRY: Well, the F.B.I. is accessible. It's the
20 detainees that are not accessible.

21 THE COURT: I would be very surprised that the
22 government would consent to a deposition and then
23 cross-examination of F.B.I. agents. Ms. Goldman?

24 MS. GOLDMAN: Well, let's draw a line between the
25 government witnesses who they want -- the five F.B.I. agents
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1 and the two CIA agents -- and it's about them that they filed
2 their APA action. And both the F.B.I. and the CIA have
3 declined to produce them for the reasons set forth in the Touhy
4 decision, and that's what they are now challenging. The
5 government has no intention of producing those witnesses.

6 With respect to the two detainees who are not our
7 employees, there is no Touhy decision, it's just that they will
8 not be made available, and that's it.

9 MR. BARRY: On national security grounds.

10 MS. GOLDMAN: Correct.

11 THE COURT: Mr. Barry, with regard to those two
12 witnesses, I would like you to do the same thing as I'm asking
13 you to do with the 9/11: Identify precisely what it is you
14 want offered into evidence, and I will rule on that. And I
15 think it makes sense to bring those three subjects on at the
16 same time: The APA summary judgment, the 9/11 evidentiary
17 point and these two deposition evidentiary points.

18 MR. BARRY: Fine, your Honor, we will do it that way.

19 THE COURT: All right. And you will try to do that as
20 promptly as you can. I'm looking forward to the filing of the
21 motion sometime in April and a briefing schedule turned in to
22 me next week.

23 MR. BARRY: A schedule, and perhaps meet with the
24 plaintiffs and try and get some agreement in respect of the
25 KSM, Khalid Sheikh Mohammad, and bin al-Shibh issues.

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1 THE COURT: I would suggest to you that you proffer to
2 them what it is you want them to do --

3 MR. BARRY: Exactly, so similar to the 9/11.

4 THE COURT: -- and they should react. But I would
5 like to have you file your motion in April.

6 MR. BARRY: Very well, your Honor.

7 MR. CLIFFORD: Your Honor, just point of
8 clarification. The APA summary judgment includes also being
9 filed in MC 101 so that we can respond?

10 THE COURT: What's the difference where it's filed?

11 MR. CLIFFORD: We are not parties to the APA case.

12 THE COURT: You are getting notice.

13 MR. CLIFFORD: Let us intervene.

14 THE COURT: You know, we're going to start a lot of
15 intervention pleadings and the like. Mr. Clifford, I'm going
16 to make a ruling that's affecting all the cases.

17 How can he make a motion that is summary judgment in
18 an APA case and file it in 101?

19 MR. CLIFFORD: Because they are known for taking two
20 bites at the same apple.

21 THE COURT: I'm ruling that you are going to be
22 treated as a party in that motion.

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23 MR. CLIFFORD: Thank you, sir.
24 THE COURT: You are going to get notice. You don't
25 have to ask me for permission to file briefs. You can file
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1 oppositions. Mr. Barry is going to talk about the briefing
2 schedule with you as well as with others, and I'm going to ask
3 all of the people in opposition to try to file as much a common
4 brief as you can.

5 MR. CLIFFORD: We will.

6 THE COURT: And the same with the parties filing the
7 motion. It is not going to help anybody if I have to read
8 multiple briefs. I would like to read one brief on each side.
9 Let's talk about the valuation issues.

10 MR. BARRY: Your Honor, if I can just -- I think
11 Mr. Ellis wants to say something to clarify something that may
12 have been said.

13 MR. ELLIS: Just real quickly, your Honor. We are not
14 claiming the government is negligent. Quite frankly, what we
15 are picking up on is language that you put in your duty
16 decision.

17 THE COURT: You will quote me.

18 MR. ELLIS: Right. It's who is in the best position,
19 your Honor, to prevent this kind of attack. We are not
20 claiming the government is negligent.

21 THE COURT: And I have made the observation previously
22 that no matter whether the government is in a better position
23 or not as good a position, I don't believe it affects your duty
24 not to act negligently if you have a duty. And the duty is not
25 going to be informed by what the government did or didn't do.

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1 MR. ELLIS: Respectfully, your Honor --

2 THE COURT: Let's not argue. My views don't count
3 now. I have not been briefed.

4 Mr. Barry, when is a good time to bring on this
5 overall motion of duty? After this spate of motions?

6 MR. BARRY: I think, your Honor, we have to make these
7 motions, see what evidence we've got as a result of these
8 motions, and then we will consider the appropriate time to --

9 THE COURT: I agree. So we will postpone that motion.
10 I will know it's coming at some point.

11 Let's talk about the issues of setting values. Let's
12 do it first with the subrogated plaintiffs.

13 Now, we know -- and there are three categories:
14 Subrogated plaintiffs that have been paid all that they're
15 going to be paid; parties that have not been paid or not been
16 paid in full, one category; and the World Trade Center parties.

17 Let's take the subrogated plaintiffs that insurance
18 companies have paid in full all that they're going to pay,
19 they're subrogated and they are suing. You have two categories
20 of arguments, and I think one is the amount that's been paid,
21 and the second is whether there is a value in terms of market
22 value that is less.

23 We all know that we can take out insurance for more
24 than market. We can insure replacement value. There may be
25 other insurable interests. You have raised in your papers the

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11 need to have a better definition of what the trial will look
12 like, and we need some meetings on that.

13 The large problem about setting a discovery closure
14 date is that it would be better done after I ruled in the APA
15 case.

16 Assuming the protocols I have recommended work to some
17 satisfaction, I think those cases could be set up for motion
18 practice by the early summer. If there is more discovery to be
19 done under the APA case, or a combination of the APA case and
20 the 9/11 issues and the terrorist deposition issues, we're
21 reasonably into 2009. If there is not much more discovery, I
22 think we can think of the end of this year as a realistic date
23 to end discovery, both fact and expert. But certainly a
24 fact -- and then I need to have a meeting to develop the
25 experts, and I don't know what you want to do with that.

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1 I think the first step in this is to have submission
2 of the motions that we talked about, Mr. Barry, and there is
3 another big motion following, a motion on duty and other
4 smaller motions with regard to various aspects of property that
5 will take up a lot of energy for the remaining months of this
6 year.

7 Subject to enlargement, according to my rulings in the
8 cases that Mr. Barry is going to be putting up for motions in
9 April, I would like to fix December 31, 2008 as the fact
10 closure date.

11 I would think our next meeting would be the time that
12 I hear the motions, the APA motion, the 9/11 motion and the
13 terrorist motion. And I would propose at that time, depending
14 on my rulings, to see if that December 31, 2008 date could be
15 accommodating to the further fact issues, or adjust that date,
16 and possibly also to fix another date where I could hear
17 proposals on other motions and on experts.

18 I'm not going to set a trial date today. Mr. Harris?

19 MR. HARRIS: Yes, Judge just a point of clarification.
20 In fact we are talking about liability and damages or just
21 liability?

22 THE COURT: We are talking about liability and
23 readiness for damages. My thinking is to start with the
24 liability trials, with a notion that the damages issues will
25 have been sufficiently explored in discovery to identify some

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1 of the cases that go into trial of damages, probably with
2 different juries.

3 But it's hard to do that, Mr. Harris. It's hard to
4 know what to do until I get a better size of how long it takes
5 to do a liability trial, what kinds of issues I can think
6 about, how exhausted we will all be. It's going to be some of
7 the same people. But my idea is once we start trying things,
8 I'm not going to be doing much else but trying these cases, and
9 I will have to work with my other colleagues to get cooperation
10 in helping in these cases and helping with my other
11 responsibilities.

12 So those are my proposals. I'm reminded that I missed
13 one thing and that is the issue that I have to put up for
14 argument with regard to the confidentiality that is to be given
15 to various of the discoveries that we've done. Who wants to